

## THE NEW PROCEDURE

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Rights are not premises, but conclusions. They emerge through a process of trying to give concrete meaning and expression to the values embodied in an authoritative legal text. The Constitution is the great public text of modern America, and adjudication is the preeminent — though perhaps not the exclusive — process by which the values embodied in that text are given meaning. Adjudication is an interpretive process through which rights are created and enforced.

In my judgment, this has always been the function of adjudication, clearly embraced and legitimated by Article III of the Constitution and continuous with the role of courts under the common law, but within recent decades a new *form* of constitutional adjudication has emerged. It is largely defined by two characteristics: First, an awareness that the basic threat to our constitutional values is posed not by individuals but by the operations of large-scale organizations, the bureaucracies of the modern state; and second, the realization that unless the organizations threatening these values are restructured, the threats to constitutional values cannot and will not be eliminated. For this complex task the traditional legal remedies—the damage judgment and the criminal prosecution—are inadequate. The injunction is the favored remedy, though it is used not as a device for stopping some discrete act, as it might have been in other times, but as the formal medium through which the judge directs the reconstruction of an ongoing bureaucratic organization.

This new mode of litigation, which I call structural reform, emerged as a distinctive form of constitutional litigation largely in response to *Brown v. Board of Education*<sup>1</sup> and the special imperatives of school desegregation. Its scope was broadened in the late 1960s and early 1970s; it was then used to test the practices of a wide variety of state agencies — the police, prisons, mental

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<sup>1</sup> 347 U.S. 483 (1954); 349 U.S. 294 (1955).

hospitals, institutions for the mentally retarded, prosecutors, public housing authorities, and public employers. The scope of structural reform became as broad as the modern state itself. By the late 1970s, however, history took a different turn. In cases such as *Rizzo v. Goode*,<sup>2</sup> structural reform came under attack and today its legitimacy is being questioned with an energy and an urgency that are indeed remarkable.<sup>3</sup> That questioning is not confined to structural reform, or for that matter, any particular mode of adjudication, but extends to the 1960s in general and the conception of state power implied by those times.

### Dispute Resolution and Structural Reform

The distinctive features of structural reform can best be understood by contrasting it with a model of adjudication that has long dominated the literature and is often used as the standard for judging the legitimacy of all forms of adjudication. This model, called dispute resolution, is associated with a story of two people in the state of nature who each claim a single piece of property. They discuss the problem, reach an impasse, and then turn to a third party, the stranger, to resolve their dispute. Courts are viewed as the institutionalization of this stranger and adjudication as the process through which the judicial power is exercised.<sup>4</sup> Although this story is used not as an argument for the primacy of dispute resolution but only as an illustration, it does in fact reflect the various premises that inform that model and that are challenged by structural reform.<sup>5</sup>

**The Absence of a Sociology.** Dispute resolution assumes a sociologically impoverished universe. There is no room in the story for the social entities that are so familiar to contemporary litigation and are a part of our reality. Social groups such as the inmates of a prison or patients in a hospital have no place in the story. Nor is there any recognition of the existence of groups that transcend institutions, like racial minorities or the handicapped. There is also no room in the story for bureaucratic organizations such as the public school system, the prison, the mental hospital, or the housing authority. The world is composed exclusively of individuals.

The party structure of the dispute resolution lawsuit reflects this individualistic bias; one neighbor is pitted against another, while the judge stands between them as a passive umpire. The structural lawsuit defies this triadic form. What we find in structural litigation is an array of competing interests and perspectives organized around a single decisional agency, the judge. This complex configuration can be traced to two facts. First, the social groups or organizations denominated parties are likely to be internally divided over the issues being adjudicated. All the members of a

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<sup>2</sup> 423 U.S. 362 (1976).

<sup>3</sup> See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

<sup>4</sup> See, e.g., M. Shapiro, *Courts* (1981).

<sup>5</sup> For the presentation of a structural case in all its detail, and for a listing of the literature this model has generated over the past decade, see chapter 9 ("Government by (Structural) Injunction") in O. Fiss & D. Rendleman, *Injunctions* (2 ed. 1984).

group or organization are unlikely to view the issue at stake in the litigation in the same way. Second, the court must often create auxiliary structures to correct the representational imperfections. Special masters and litigating amici are typically appointed by the court in structural suits and one of their duties is representational:<sup>6</sup> They are to present views that otherwise might be slighted by those who purport to speak on behalf of the groups or organizations that are officially denominated as the parties.

In addition to altering party structure, the introduction of sociological entities complicates the remedial process. In dispute resolution, an individual is both victim and spokesperson and also the beneficiary of a court decree; but in the structural suit the victim and beneficiary are social groups and that complicates the remedial task. The judge must determine whether the victim and beneficiary groups should be coextensive and formulate criteria for determining which individuals are to be included within those groups. Similarly, the bureaucratic character of the defendant forces the judge to move beyond the traditional universe of remedies. A remedy such as the issuance of a narrow injunction addressed to some identifiable individuals and aimed at prohibiting some specific act is unlikely to be efficacious, precisely because bureaucracies tend to diffuse responsibility and acquire lives of their own. Only restructuring the organization will remove the threat it poses to our values. Restructuring an organization is a complex and difficult task, which requires a measure of activity on the part of the judge that is at odds with the picture of him as a passive umpire, simply choosing between the two neighbors. In the structural suit the judge becomes the manager of a reconstructive enterprise.

**Private Ends.** In the hypothetical state of nature, where the dispute resolution story takes place, there are no public values, only the private desires of individuals—in this instance, the desire for property. Peace is a public value, but only insofar as it is a precondition of satisfying private ends. The story postulates that the judge (the stranger) settles a property dispute between neighbors, but it does not tell us how the judge resolves the dispute, only that it is resolved. The judge may resolve the dispute according to any procedure that will minimize disputes or, more generally, maximize the satisfaction of private ends.

Structural litigation does not begin with indifference toward public values or ignorance of them. It insists that there is more to our public life than peace. Structural reform proceeds within the framework of a constitution; and the Constitution that stands vindicated by a case like *Brown v. Board of Education* is a constitution that does far more than simply establish a form of government. It identifies a set of values—equality, liberty, no cruel and unusual punishment, due process, property, security of the person, freedom to speak, for example—that inform and limit the activities of collective institutions such as the state. It is a constitution that constitutes our public morality. This morality gives our society its inner coherence or identity and serves as the substantive foundation of

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<sup>6</sup> Aronow, *The Special Master in School Desegregation Cases*, 7 Hastings Const. L.Q. 739 (1980).

structural litigation. The very point of the structural suit is to protect public values from the threats to the bureaucratic state.

In the dispute resolution story, the judge stands neutral between the ends of the feuding neighbors and is uncommitted to them: They are private ends. The judge is to be fair and impartial in enforcing the established rules, much as an umpire must be, but that is the limit of his commitment. In a structural suit, however, the judge is confronted with a claim that public values are being threatened, and the judge's commitment to those values supplements his commitment to procedural fairness. The judge is devoted to serving public values and thus unwilling to rely wholly on the initiatives and strategies of the various parties, which often reflect their private motives and limitations. The judge is asked to abandon the posture of a passive umpire and to take an active role in the proceedings, to make certain that the facts and the law are fully presented and that the defendant complies with whatever decree may be entered.

**Natural Harmony.** A third supposition of the dispute resolution story, reflecting either its individualism or its indifference to public values, is that without the intervention of courts or other governmental agencies, society is in a state of natural harmony. As suggested by the concept of a "dispute" itself, the story assumes that the subject of adjudication is an abnormal event that disrupts an otherwise satisfactory world. The story also suggests that the function of adjudication is to restore the status quo. Structural litigation denies that assumption, because it is committed to public values and because it accords a recognition to the imbalances of social power possessed by various groups and organizations. Structural reform questions whether the status quo is in fact just.

This skepticism helps to explain two features of the structural model. The first concerns the requirements for initiating a lawsuit, which have become less exacting: It is unnecessary for the plaintiff to be fully informed of the facts before filing the suit, and once the suit is filed, far-reaching discovery mechanisms become available, not simply to facilitate an exchange of information, but to allow the plaintiff to investigate and substantiate his claims. Discovery is seen as the poor man's FBI. Doctrines concerning standing have also become more permissive and objections based on mootness less decisive. The need for judicial intervention is no longer seen as an aberration, and procedural rules that require the plaintiff to be personally aggrieved and to present an actual controversy have been adjusted to facilitate the challenges. In this way, the foundation for the private attorney general concept has been laid and it too can be seen as part of the structural model.

Second, doubts about the justice of the status quo explain the ambitious nature of the remedial process. The goal of dispute resolution is to set things back to "normal;" the imagined remedy is short and discrete, because it undertakes to repair or reestablish the world that existed before the dispute. This is not, however, the aim of the structural suit. It seeks to create a *new* status quo. Restructuring a prison or a school system cannot be understood as an attempt to return to a world that existed before some dispute; it must instead be seen as an attempt to construct a new social reality, one that will be more nearly in accord with our constitutional

ideals. This reality will last indefinitely and so will the judiciary's responsibility to monitor the series of orders that brings that reality into being.

**Isolation of the Judiciary.** The dispute resolution story depicts the judiciary as an isolated institution. The courts are not viewed as an integral part of government. The quarreling neighbors ask the stranger—any stranger—to resolve their dispute. This mythical account of the process by which courts are created implies that courts can be understood apart from the larger system of government. It also suggests that the legitimacy of courts derives from the consent of the citizenry and that this consent is institution specific. The neighbors agree to take the dispute to the stranger and to abide by his decision.

In modern society, this method of conferring authority on the judiciary is impossible to imagine, but the consensual foundation of judicial power is nevertheless preserved through more subtle forms. Professor Lon Fuller, for example, tries to found the authority of adjudication on the individual's right to participate in that process. Participation supplants agreement but the thrust is still individualistic and consensual. According to Fuller, the right of the individual to participate in adjudication is the source of judicial authority, just as the right to vote legitimates legislation and the right to bargain legitimates contracts.<sup>7</sup> Other scholars, reflecting the *Carolene Products* tradition, have attempted to found the judicial authority on the ability of courts to protect the disenfranchised and powerless in majoritarian struggles.<sup>8</sup> They see the judiciary as an institution dedicated to perfecting those processes through which American society collectively consents to the action of its government.

In my view, courts should be viewed not in isolation but as a coordinate source of governmental power and as a part of the larger political system. Democracy does in fact commit us to consent as the foundation of government, but that consent is not granted separately to individual institutions. It extends to the system of governance as a whole. Although the legitimacy of the American political system depends on the people's consent, an institution within the system does not depend on popular consent, either in the individualized sense suggested by Fuller or in the more collective sense suggested by the *Carolene Products* tradition. Rather, the legitimacy of a particular governmental institution stems from its capacity to perform a distinctive social function within the larger political system. The power judges exercise in structural reform, or for that matter, in any type of litigation, is not founded on consent, but on the competence of the judiciary to perform a distinctive social function, which is, as I have suggested, to give concrete meaning and application to the public values embodied in authoritative legal texts.

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<sup>7</sup> Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978). A more extended response to Professor Fuller's account can be found in my essay, *The Forms of Justice*, 93 Harv. L. Rev. 1 (1979).

<sup>8</sup> J.H. Ely, *Democracy and Distrust* (1980).

It is not at all necessary, when speaking of this special competence of the judiciary, to ascribe to judges the wisdom of philosopher-kings. The capacity of judges to understand and interpret public values turns not on some personal moral expertise, of which they have none, but upon the process that limits their exercise of power and constitutes the authoritative method for construing a public morality. One feature of that process is dialogue: Judges must listen to all grievances, hear a wide range of interests, speak back, and assume individual responsibility for what they say. Another feature of the judicial process is independence: Judges must remain independent of the desires or preferences both of the body politic and of the particular contestants before the bench. Other agencies may engage in dialogue and also may achieve a measure of political independence, and thus claim a right to construe the public morality, but these processes—dialogue and independence—have preeminently and traditionally been identified with the judiciary. They are the source of the judiciary's claim to competence and the foundation of its authority.

In this scheme, popular consent to a specific institution or its action is minimized. The judiciary's competence and thus its legitimacy depend on its willingness to engage in dialogue on the meaning of our public values, and its capacity to remain independent of politics, not on the willingness of the people to consent to particular outcomes or on the capacity of the people to appoint and remove from office those who exercise the judicial power. The people's consent is required to legitimate the larger political system, and thus the people must be able to respond to judicial decisions—for example, through constitutional amendments or through new appointments—in order to preserve the consensual character of the system as a whole. But a tighter, more particularized dependence of judicial decisions on popular consent would deprive the judiciary of its independence and thus its competence to speak the law.

### Threats to the Legitimacy of Structural Reform

The dispute resolution model is at odds with the social and political reality of modern society, and yet it has rebounded from relative invisibility in the 1960s to enjoy a renewed popularity in the 1980s. Structural reform is under attack. This development cannot be attributed to the rather banal poetry of the dispute resolution story or even to some nostalgic longing it may evoke for an oversimplified world. Nor can it be attributed to the fortuities of politics and the character of judicial appointments over the past decade. The causes are, I fear, much deeper.

**Instrumentalism.** Many are disappointed in the results of structural reform: It promised to desegregate the schools, to civilize the prisons, and to curb police brutality, yet many of these promises have gone unfulfilled.<sup>9</sup> This disappointment has no doubt led some to question the legitimacy of structural reform, just as the failure of the Great Society to achieve all it

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<sup>9</sup> See, e.g., D. Horowitz, *The Courts and Social Policy* (1977).

promised led to a decade of national politics in which both parties appeared dedicated to attacking the activist state or, in the slogan of the day, “big government.”

Disappointment is a function of expectations and the expectations that fuel this reaction to structural reform strike me as unrealistic. Success is not perfection, surely not within the relatively short period of time within which structural reform has had to work. The dual school system is the product of a deeply entrenched political and social tradition—one century of Jim Crow and another of slavery—and it would be close to amazing if this legacy could be fully eradicated within a decade or two. The brutality of prisons has an even deeper history—and so on: The problems posed by the bureaucracies of the modern state law are almost intractable. In evaluating the performance of institutions—particularly non-governmental ones—we have learned to adjust our expectations to account for the difficulty of the tasks they undertake. The judiciary is entitled to this same indulgence.

Of course, even once our expectations have been adjusted, a question still remains as to whether the achievements of structural reform have been sufficient. I believe they have; “disaster by decree”<sup>10</sup> has occurred, but in my judgment it has been the exception rather than the rule. I also believe that no other institution would have been more successful in protecting our public values from the threats of the bureaucratic state. The empirical evidence upon which these beliefs depend cannot fairly be presented in this setting, much less analyzed (I am not even sure it has been gathered in any rigorous fashion). But some perspectives on these issues can be gained simply by asking whether there is any reason for assuming that the judiciary will be less successful in these reform measures than some other institution might have been. I think there is not.

Admittedly, the judiciary is disabled in the remedial enterprise because it does not have control over the purse, and because the judiciary is constrained by professional norms requiring it to remain independent of politics; desegregating an urban school system will require millions and millions of dollars and the good will and cooperation of the citizenry that can only come from “playing politics.” But what from a purely remedial perspective appears as a disability is from a rights perspective a special source of strength. Independence may disable the judiciary in its remedial efforts, but it is the reason why we trust the judiciary to interpret the values embodied in authoritative legal texts and to turn them into rights. Maybe a “sensitive” and “deft” politician can get more people to do what he wants than a judge can, but the politician is also likely to want less.

For these reasons, I find the instrumental critique of structural reform to be without factual support; success rather than failure is the term I would use to characterize the record, especially compared to what other institutions might have accomplished and proper account is taken of the magnitude of the task. Some may disagree with this assessment, or my

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<sup>10</sup> The phrase is from Lino Graglia's book *Disaster by Decree* (1976).

general perspective on these issues, but even then, I wonder whether the imagined disappointments can throw the legitimacy of this model of adjudication into doubt. Legitimacy has to do with authority, not success. Legitimacy is a matter of institutional entitlement. The authority of the judiciary to do what it is doing in schools or prisons does not turn on the success of its intervention, but rather on the special integrity of its process, the willingness of the judiciary to engage in a dialogue over the meaning of public values and to remain independent from the parties and the body politic.

Indeed, I would go one step further. We should not turn our disappointments into doubts about legitimacy, but even more, we should understand that the relationship between remedial efficacy and legitimacy is just the opposite of that assumed by the instrumental critics. A blind commitment to remedial efficacy—a preoccupation with the how—questions and a disregard for the limitations of the judicial office—will jeopardize rather than enhance judicial authority. To make a desegregation plan work, for example, the judge needs the cooperation of parents, teachers, administrators, and legislators, and the judge possessed by a desire to be efficacious may begin to bargain, negotiate, or play “politics” with these parties. He may temper his idealism. He may insist on less so as to get something, and when he does, he will undermine his authority. This is a danger that we must attend to, and might be endemic to structural reform, but, to avoid my message being misunderstood, I should point out that this danger does not call for the abandonment of that model. The danger arises from the entirely admirable ambition of the judge to make our public values a reality, and a proper recognition of this danger calls not for a renunciation of that ambition but only an adjustment. The judge must recognize the limits of his office and the tools at his disposal.

**The Bureaucratization of the Judiciary.** The history of the twentieth century is one of increasing bureaucratization. All forms of institutionalized power, both public and private, have become bureaucratized, and the judiciary is no exception. When the charge of bureaucratization is levelled at the judiciary, however, the complaint is not the familiar one of excessive rigidity—that an official has become a slave to general rules—for the ideal of the rule of law requires judges to adhere to general rules. The complaint is instead addressed to the fragmentation of the judicial power and the delegation of judicial duties, both of which tend to diffuse responsibility and insulate the judge from critical educational experiences. The danger is that adjudication will become the rule by nobody.<sup>11</sup>

The bureaucratization of the judiciary is not especially tied to structural reform. It is a function of the growing size and complexity of American life, which increases caseloads and makes information, both of a legal and factual nature, more and more difficult to process. Judges would turn to auxiliary personnel, such as law clerks, and use them in the decisional

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<sup>11</sup> These issues are addressed more fully in a recently published essay of mine, *The Bureaucratization of the Judiciary*, 92 Yale L.J. 1442 (1983).



process even had they never heard of structural reform and were content to do nothing else but resolve disputes. In that sense, the bureaucratization of the judiciary is an inescapable feature of modern life. There are, however, several aspects of structural reform that aggravate these tendencies and that might constitute a further reason for turning away from that model and toward dispute resolution. They can be seen more clearly by examining the practice of many judges to appoint special masters in structural cases—a practice that exemplifies both the achievements of structural reform and another of its dangers.

As I noted earlier, sometimes a special master is appointed in a structural suit to supplement the representation afforded by the parties. The judge treats the special master as a party, something like an amicus, though not tied to any identifiable interests. The dysfunctions associated with bureaucratization do not arise from this limited practice, but rather from the fact that the judge sometimes goes one step further and delegates to the special master some of his duties. This occurs, for example, when the judge appoints a special master to conduct an evidentiary hearing, or to dispose of some particular substantive issue; or when the special master is asked to formulate a remedy and convince the parties to accept it; or when the special master is charged with the duty of monitoring the defendant's performance under the decree and determining whether there is compliance.

Delegation of this kind is attributable to a number of factors. One is the sheer complexity of the case. All modern cases are complex but a structural one is especially so. It requires the judge to inquire into the operation of a large-scale bureaucratic organization and, if need be, to reorganize it. The volume of detail in such an undertaking is staggering, and the judge may well not have the time or patience for it. Second, there may be an unusual need for specialized knowledge, for example, as to how the bureaucratic organization in question works and interacts with its environment. The judge might hope to capture this special knowledge by appointing as special masters persons with some special background in these matters. Third, the judge might want the special master to engage in certain kinds of activities that he is denied, such as meeting the parties one at a time, and off the record, in an effort to convince them to accept the proposed remedy.<sup>12</sup> Such discrete emissaries may always be desired, but especially so in the structural context, since the remedy is so ambitious and so dependent on the good will and cooperation of innumerable persons. Finally, the judge might use the special master as a "lightning rod," that is as a way of deflecting responsibility from himself for the controversy likely to be engendered by the proposed reform.

Obviously, some of these reasons for delegating power to a special master are more appropriate than others, but whatever the reasons, the danger is the same: The judge is dividing and delegating his responsibility and, to some

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<sup>12</sup> See, e.g., Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 Colum. L. Rev. 707 (1978).

indeterminate degree, insulating himself from the presentation of the facts and the law. Such delegation will not compromise judicial independence (in fact it might have the opposite effect, since it gives the judge the organizational resources necessary to free himself from a dependency on the political branches), but it may well interfere with the quality of the dialogue that he must engage in. There is a risk that because of his delegation to the special master the judge's signature is but a sham and that he has not listened to the grievances, nor decided the issue or chosen the remedy, nor even given the reasons for the decision. He may well be violating that elemental principle of judicial authority that requires, as Chief Justice Hughes put it, "The one who decides must hear."<sup>13</sup>

Bureaucratization in contrast to the instrumental failures might thus be a genuine source of the crisis of structural reform. It would be a mistake, however, to assume that it requires a rejection of the structural model or even that judges can never call upon special masters or other auxiliary personnel to assist in the discharge of their duties. Some of the factors that led to their appointment are quite genuine. What is called for is a measure of caution and the consideration of two different organizational strategies. First, the appointment of auxiliary personnel, such as a special master, should be deemed a matter of last recourse. The judge should be required explore alternatives before turning to special masters. The appointment of amici, for example, might meet the unusual representational needs of structural litigation, and yet avoid the bureaucratic dangers entailed in using a special master. In a similar fashion, expert witnesses might be used to meet the special informational needs of structural litigation. Neither the amici nor the expert witness will shield the judge from responsibility for his decision, or allow him to get rid of unwanted tasks, but that is how it should be.

Second, even when the judge must turn to special masters, and exercise this power of last resort, care must be taken to avoid delegation. These auxiliary personnel must be seen as part of the judge's staff, to assist him in the discharge of his duties, not to get rid of certain of those duties. Auxiliary personnel must not be given the power to decide, and in reviewing their work, the judge must avoid the "rubber stamp." He must keep auxiliary personnel under his immediate and direct supervision. Such a rule is, of course, almost impossible to police: It can only be understood by the judge as an ideal or ethic of his calling and, even then, it might not avoid altogether the diffusion of responsibility or bureaucratic insularity that threatens the legitimacy of the judicial enterprise. But such a rule does make clear that the principal source of the problem is not the model of adjudication that I have called structural reform but the willingness of the judge to do all that his job requires.

**The Privatization of Ends.** The instrumental critique can be answered by adjusting our expectations; the bureaucratic critique can be answered by

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<sup>13</sup> *United States v. Morgan*, 298 U.S. 468, 481 (1936).

making changes in organizational format. Structural reform confronts another challenge, however, and it is, I am afraid, less amenable to solution. It arises from the fact that we no longer believe that there exists apart from individual preferences and interests a body of public values that are to be interpreted and protected by the judiciary. All values are privatized.

My account of adjudication is premised on the view that courts are a coordinate branch of government, and thus it is no surprise that the crisis of legitimacy affecting the judiciary is affecting all forms of governmental power. We saw this in analyzing the instrumental and bureaucratic critiques and it appears once again in this development that affects the normative foundations of structural reform. The privatization of ends has both left adjudication of the structural variety without a normative foundation and has led to the resurgence of classical liberalism and its general wariness of state power.

I believe it significant that the story of two neighbors fighting over a piece of property takes place in the state of nature, because it was there that the classical liberals founded the state. It was there that the social contract was formed. Like dispute resolution, social contract theory lacks a sociology; it assumes ends are private, in that power is legitimated through individualized consent, and postulates, at least in Locke's version, that natural harmony generally prevails. The chief end of the state in the social contract tradition is security: to develop those conditions that will allow private persons to engage in commerce and to satisfy their own desires. The conception of government enshrined by social contract theory and preeminent in America through much of the nineteenth century—the so-called night-watchman state<sup>14</sup>—is the analogue to the limited conception of judicial power implied by the dispute resolution model. It too is aimed at keeping the peace.

During the twentieth century, particularly in the decades since the New Deal and World War II, America saw the emergence of a different kind of state altogether. The state became an active participant in our social life, supplying essential services and structuring the very terms of our existence. To legitimate that conception of government power, we had to develop a theory of consent radically different from the individualistic, unanimous consent exalted by the social contract tradition. We also had to develop a conception of social life sufficiently rich and purposive to render intelligible the pervasive and almost continuous interventions of the state. This was the achievement of the 1960s.

The emergence of the activist state during the sixties parallels the emergence of the new form of litigation that I have called structural reform. Indeed, one can go further and identify a common theoretical foundation for both manifestations of governmental power. Both take account of sociological realities, reflect a skepticism about the justness of the status quo, and contemplate a pervasive and continuous use of government power. Both are grounded in a belief in the existence and importance of

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<sup>14</sup> The phrase is from R. Nozick, *Anarchy, State and Utopia* (1974).

public values and a recognition of the need to translate those values into social reality through the use of governmental power.

Equality was the centerpiece of the litigation of the sixties and the guiding ideal of the legislative and executive programs of that era, but it had a representative significance: It stood for an entire way of looking at social life. Equality denoted a sphere of values that are truly public, in the sense that they define our society and are not reducible to an aggregation of private ends. Rights were not seen as entitlements that devolved on us simply by virtue of our status as "persons," but as the concrete embodiment of these public values and, as such, an expression of our community rather than our individuality.

Today, we feel increasing doubts about that entire way of looking at our social life, and we are witnessing the resurgence of dispute resolution and the night-watchman state as an expression of those doubts. When all ends are private, only dispute resolution and the minimalist state of the night-watchman make much sense. Structural reform and the activist state contemplate an affirmative use of governmental power to protect the values that underlie and inform our public life and find themselves in the throes of crisis precisely because we have lost that vision of American social life that understands the importance of the public in our individual lives.

I do not know how that vision can be recovered, or even why we lost it. An understanding of the linkage that I have drawn between these models of adjudication and broader conceptions of state power will not end the crisis. It does suggest, however, the urgency of the intellectual task we confront. What is at issue when we speak of the crisis of structural reform is not simply the legitimacy of a new model of legal procedure, which might seem to some to be an arcane and highly technical abstraction; what is at issue is instead a general conception of governmental power. The linkage of the new procedure and the activist state also suggests that the solution to this crisis is not to be found in the law itself, but rather in our capacity to generate a new social vision. The struggle between dispute resolution and structural reform is ultimately a struggle between the private and the public and the outcome of that struggle will turn on our capacity to understand that our individual identity and well-being is vitally dependent on the quality of what we have common.